(13)

No. 89-640

In The

Supreme Court of the United States

October Term, 1989

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, *et al.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AND MINERALS EXPLORATION COALITION AS RESPONDENT SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in a lawsuit challenging a government program affecting the use or disposition of approximately 180,000,000 acres of public land, an environmental organization may establish standing to sue by relying on an affidavit asserting that one member of the organization makes use of property "in the vicinity of" a particular 2,000,000 acre parcel, only 4,500 acres of which were affected by one of 814 separate agency actions taken under the challenged program.

2. Whether the injury of Respondent may be fairly traced to the challenged program even though there are intermediate discretionary Executive actions between the program and the injury, and redress of the injury would require discretionary Executive action.

LIST OF PARTIES

Mountain States Legal Foundation (MSLF) and the Minerals Exploration Coalition (MEC) were Defendants-Intervenors-Appellees in the United States Court of Appeals for the District of Columbia Circuit. MSLF and MEC filed a Petition for a Writ of *Certiorari* in this case on October 18, 1989. That Petition, docketed as No. 89-628, is pending before this Honorable Court.

The following were Defendants-Appellees in the United States Court of Appeals for the District of Columbia Circuit: Robert F. Burford, in his official capacity as Director of the United States Bureau of Land Management (Mr. Burford has been replaced in that capacity by Delos Cy Jamison); Donald Paul Hodel, in his official capacity as Secretary of the Interior (Mr. Hodel has been replaced in that capacity by Manuel Lujan, Jr); and the United States Department of the Interior.

ASARCO, Inc., was granted intervention in the District Court proceedings by the United States Court of Appeals for the District of Columbia Circuit. ASARCO, which was an Applicant for Intervention at the time, did not file a Notice of Appeal in the case at bar.

The National Wildlife Federation was Plaintiff-Appellant in the United States Court of Appeals for the District of Columbia Circuit and is Respondent to this petition.

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OPINIONS BELOW

Review is sought of the opinion reported as *National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989), appearing at pages 1a-25a of the Petition Appendix. The District Court's opinion, *National Wildlife Federation v. Burford*, No. 85-2238 (filed November 4, 1988), and Order appear at pages 26a-37a of the Petition Appendix. References to the Federal Petitioners' Appendix to their Petition for a Writ of *Certiorari* are hereinafter referred to as

"Pet. App." References to the Joint Appendix are hereinafter referred to as "Jt. App."

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit rendered judgment against Federal Petitioners and Mountain States Legal Foundation (MSLF) and the Minerals Exploration Coalition (MEC) on June 20, 1989. Separate Petitions for a Writ of *Certiorari*, were filed by the federal government (No. 89-640) and MSLF and MEC (No. 89-628) on October 18, 1989. This court granted review of No. 89-640 on January 16, 1990. No. 89-628 is still pending.

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

This action is based on article III standing requirements of the United States Constitution.

STATEMENT OF THE CASE

The Withdrawal Review Program

Respondent in this case has undertaken a sweeping challenge of a broad, general purpose, statutorily mandated, government program: a program to eliminate unneeded withdrawals and classifications of the public

lands. Years, and in many cases decades, ago when the withdrawals and classifications in question were created, they served a multitude of purposes. However, since the purposes originally sought to be served by the withdrawals and classifications have ceased to exist, those outdated withdrawals and classifications of the public lands were eliminated by the Bureau of Land Management (BLM) under its Withdrawal Review Program pursuant to an Act of Congress. *See* 43 U.S.C. § 1714(*l*) (1982).

The public lands of the United States are generally available for a host of uses under numerous statutes. Both public and private entities can take advantage of opportunities to use the federal domain. For example, a private person can stake a mining claim,[1] request a land exchange to make management of his ranch easier,[2] or establish a communication site.[3] A public entity can build a dam, establish a military reserve, or create a park or wildlife refuge. Hundreds or thousands of other possible uses exist..

If an anticipated future use of a portion of the public lands would be exclusive of all other uses, then the federal land management agencies can "withdraw" that land from the public domain. For example, some of the withdrawals in this case involved proposed dam sites. If the government wishes to build a dam, then almost all other permanent uses in the flooded area are incompatible. The prudent federal land manager precludes those

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[1] *See* 30 U.S.C. § 22 (1982).

[2] *See* 43 C.F.R. Part 2200 (1988).

[3] *See* 43 U.S.C. § 1732(b) (1982).

incompatible uses by making a withdrawal. Land classifications work in a similar fashion. Many areas affected by this suit were classified for disposal or sale. Again, other permanent uses in areas to be sold would be incompatible so the prudent federal land manager uses a classification to restrict conflicting uses. *See* Jt. App. 87, 97-100.

The need for a Withdrawal Review Program became evident when many of the original purposes for which land had been withdrawn or classified failed to come to fruition. Many dams that had been proposed were never built. Most of the land that had been classified for sale was never sold and Congress subsequently changed its policy to discourage the sale of public lands. By the 1950s, it became clear that there were thousands of withdrawals and classifications which served no purpose and, in fact, obstructed efficient land use and management.

Withdrawal review began as an internal program of the Bureau of Land Management in 1956.[4] Apparently, little progress was made under that early program, because, in 1976, Congress mandated the Withdrawal Review Program at issue here and set a deadline for completion of that program in the Federal Land Policy and Management Act of 1976. 43 U.S.C. § 1714(*l*) (1982). As a result, in the late 1970s, the Carter Administration set up procedures for the Withdrawal Review Program

[4] *See* 2 C. WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS, 420 (1969).

and began to make the revocations that are challenged in this case. Jt. App. at 89-96. The Reagan Administration continued the Withdrawal Review Program.[5]

The sufficiency of the administrative process by which the Bureau of Land Management implemented the Withdrawal Review Program is the issue raised by Respondent's complaint. In reviewing the issue presented, this Honorable Court should be aware that the withdrawal revocations and classification terminations were accomplished through more than 814 separate agency actions. Each one of the 814 agency actions, constituting the program challenged in this case, was preceded by its own administrative decision-making process including that pursuant to the National Environmental Policy Act of 1970 (NEPA), 42 U.S.C. §§ 4331-34 (1982). Moreover, each revocation of a land withdrawal or termination of a land classification was announced in the *Federal Register*.

For example, the individual 4,500 acre parcel of land near Lander, Wyoming, that is the situs of the injury alleged by Respondent for standing, was opened to the operation of the public land laws, including the General Mining Law of 1872, only after a thorough administrative process. The BLM sought extensive public participation and conducted complete environmental review and planning, including the environmental action required by

[5] In its complaint, Respondent chose to address only those withdrawal revocations and classification terminations initiated after January 1, 1981. This constituted 180,000,000 acres, or an area larger than the States of Texas, New Hampshire, and Vermont combined.

NEPA. Jt. App. 123-139.[6] Environmental groups and others had ample opportunity to be heard – and they were heard – in the agencies' decision-making process before each individual action was undertaken, or proposed to be undertaken. *See Id.* However, Respondent did not challenge the proposed action near Lander, Wyoming, or, for that matter, any other individual proposed action taken under the Withdrawal Review Program.

This Honorable Court should also note that the intent of the congressionally mandated Withdrawal Review Program is not to terminate "environmentally protective" withdrawals and classifications. The only "protection" intended by the withdrawals and classifications is from conflicts in land use. Those conflicts no longer exist. Any environmental protection provided by the withdrawals and classifications is incidental at best. For example, a dam site or a bombing range withdrawal may prevent mining, but these withdrawals can hardly be classified as "environmentally protective." Probably the bulk of the

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[6] After the District Court received evidence on the procedures that were conducted in the area where Respondent claims injury for standing in this case, the Court made the following statement:

> The Kelly Affidavit sets forth in great detail the voluminous process started in 1977 and concluded in 1984 that the BLM office in Lander, Wyoming followed in reaching its decision to terminate Classification No. W-6228. It completely answers plaintiff's claims of inadequate land use plans, lack of conformance determinations and insufficient opportunities for public participation.

National Wildlife Federation v. Burford, No. 85-2238, Memorandum Opinion at 10-11, n.12 (November 4, 1988), Pet App. 35a.

withdrawals and classifications was for such things as sales to the public or pathways for cattle drives.[7] Obviously, these withdrawals and classifications were not intended to provide "environmental protection."[8]

Proceedings in This Case

On July 15, 1985, fourteen months after the decision by the BLM on the Lander parcel, Respondent brought suit to enjoin the Withdrawal Review Program. Jt. App. at 137. On December 4, 1985, the District Court issued a preliminary injunction precluding any originally prohibited activity on the 180,000,000 acres of withdrawal revocations and classification terminations made after January 1, 1981. The court enjoined approximately 814 past agency actions along with all similar future actions. The parcel of land near Lander, Wyoming, upon which Respondent asserts its sole basis for standing, was just one of the 814 areas regarding which activities were enjoined.

Approval of mining plans, which are of particular interest to Mountain States Legal Foundation and the Minerals Exploration Coalition, was enjoined. Also enjoined were such actions as removal of a dam site

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[7] The latter use accounts for a large number of revocations.

[8] The size of the Withdrawal Review Program and the disparate and extremely diverse nature of the 814 separate agency actions would not be appropriate for one of the stated objectives of Respondent, that is, a programmatic Environmental Impact Statement (EIS). Such a programmatic EIS would be totally useless in fulfilling the information requirements of NEPA.

withdrawal in the Grand Canyon, consolidation of land in wilderness areas, acquisition of private inholdings in wildlife refuges, and a land exchange involving the Nature Conservancy. Numerous other environmentally beneficial actions were enjoined as well. The injury complained of by Respondent to gain standing – primarily the opening of land to mineral exploration under the General Mining Law of 1872 – involved only 13,000,000 acres of the 180,000,000 acres enjoined by the suit, or about seven percent of the total acreage.[9]

Once the sweeping injunction was in place, Respondent assumed the role of *de facto* federal land manager. In at least one instance, the proponent of a land exchange, blocked by the injunction, contacted Respondent. Subsequently, for reasons known only to the proponent of the land exchange and Respondent, Respondent determined that the revocation of the outdated withdrawal or classification would benefit its interest. Respondent then filed a motion with the court to allow the revocation to proceed on that one parcel.[10]

This suit presented an untenable situation for the members of MSLF and MEC who must be able to rely on the certainty of federal permits and federal title for activities upon or rights to public land. MSLF and MEC

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[9] 13,000,000 acres is the land area opened to entry for mining under the General Mining Law of 1872, 30 U.S.C. § 22 (1982). The actual area disturbed by mining is only a few hundred acres.

[10] *National Wildlife Federation v. Burford*, No. 85-2238 (NWF Motion for Voluntary Dismissal, filed April 11, 1986).

members, who hold mining claims and mineral leases, after having completed every necessary environmental and public participation procedure at the local level were faced, following Respondent's lawsuit, with the prospect of losing all of their rights because of an alleged flaw in a nation-wide, congressionally mandated program.

In November of 1988, the United States District Court for the District of Columbia held that Respondent lacked standing to sue and granted summary judgment against Respondent. Respondent appealed to the Court of Appeals for the District of Columbia Circuit.

MSLF presented the foregoing facts and the following arguments in opposition to Respondent's appeal to the District of Columbia Court of Appeals. The Court of Appeals dismissed the arguments as being without merit. Pet. App. 12a, n.10. The Court of Appeals held that the one alleged injury caused by a classification termination near Lander, Wyoming – which Respondent failed to challenge during the lengthy environmental review process that preceded the classification termination – was sufficient to establish standing to challenge the entire program. Pet. App. 18a, n.13. Thus, the Court of Appeals held that Respondent, having forgone its earlier opportunity for a focused challenge to a specific proposed federal action, was now free to attack the broad, general purpose, statutorily mandated, government program under which the specific action was taken.

Basis for Standing in This Case

In December of 1985, MSLF argued that Respondent had not substantiated its standing to sue. In May of 1986, Respondent filed three affidavits with the district court. The affidavit of Ms. Peggy Kay Peterson stated:

> My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area has been opened up to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

Pet. App. at 191a. Another, almost identical, affidavit was submitted by Richard Loren Erman alleging use of land "in the vicinity of the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest." Pet. App. 187a-189a.

The Court of Appeals upheld standing based solely on the Peterson affidavit. Pet. App. at 18a, n.13.

SUMMARY OF ARGUMENT

In *Allen v. Wright*, 468 U.S. 737 (1984), this Honorable Court used the Separation of Powers Doctrine to aid in interpreting whether injury alleged for standing was fairly traceable to the alleged wrong-doing. The Argument of MSLF urges this Honorable Court to follow the *Allen* line of cases and expand on how the Separation of Powers

Doctrine should be used when analyzing causation to determine standing.

In the case at bar, Respondent claims to have been injured by a threat of mining in a small area of Wyoming. The alleged wrong-doing is in the structuring of an agency-wide program administered in Washington, D.C. In tracing the injury from the program to the mining threat, there are several intervening discretionary Executive actions. Notably, the action of opening the land to mineral entry – Respondent's only claim to direct injury – is completely within the discretion of the Executive Branch. Moreover, that discretionary action was not challenged in this lawsuit.

If a court were to fashion an order to redress Respondent's injury, then it would have to order the Executive Branch to exercise its discretion to prevent mining in that small area of Wyoming. Such an order affecting a discretionary Executive action which is not even before the court would be a serious breach of the Separation of Powers Doctrine. For that reason, where intervening discretionary Executive actions separate the injury from the wrong-doing or the injury from the relief, either the chain of causation or the chain of redress is broken and no standing can lie.

The analysis of how intervening discretionary Executive actions break the chain of causation or the chain of redress is consistent with this Honorable Court's past decisions denying standing for adjudication of government programs and generalized grievances.

ARGUMENT

Standing is that aspect of justiciability that focuses on the entity bringing a lawsuit. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). In its analysis, a court asks if the plaintiff is the proper person to bring the lawsuit in question. The focus is not entirely personal, however. In recent years, this Honorable Court's analysis of standing has centered on three elements: 1) personal injury-in-fact; 2) that can be fairly traced to the challenged government action; and, 3) the requested relief will be likely to redress the injury. *Id.* at 751. The latter two elements look to the legal and factual surroundings of the lawsuit as well as the personal situation of the plaintiff.

The first requirement – personal injury-in-fact – has been reduced to an identifiable trifle.[11] *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1972). Cases establish that aesthetic injury qualifies to meet this requirement. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). While the case at bar presents serious questions as to whether Respondent has met this Honorable Court's injury-in-fact requirements, MSLF will not address them in detail. MSLF anticipates that the Federal Petitioners will address this topic at length. Instead, MSLF will concentrate its argument and analysis on the requirements of causation and redress as established by this Honorable Court's standing test.

[11] MSLF questions whether this amount of injury is sufficient to meet the requirements of article III. However, we leave it to others in this case, or other cases, to challenge this point.

In *Allen v. Wright* this Honorable Court elaborated upon and then expanded its previous applications of the causation and redressability tests – especially that applied in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). In particular, the Court chose to use the causation requirement of its three part test of standing as the means to examine the policy implications underlying standing – notably the Separation of Powers Doctrine. *Allen*, 468 U.S. 759-761. After *Allen*, one of the factors to be considered in analyzing causation is the impact on the Separation of Powers Doctrine.

This Honorable Court's decision to use the Separation of Powers Doctrine in its interpretation of the causation analysis of standing met with some criticism. It was argued that the Separation of Powers Doctrine should have been considered in issue-focused aspects of justiciability – *i.e.*, ripeness, mootness, or political question – or in prudential considerations, instead of the causation element of standing.[12] Indeed, the Doctrine has been applied in these situations in the past; however, the result has been unfortunate confusion. *See* 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3529 (2d ed., 1984).

MSLF believes that the course chosen by this Honorable Court was the proper one for several reasons. First, the causation element of the standing test is a constitutional test founded on article III of the Constitution. Past confusion over whether the application of the test of standing to ensure compliance with the Separation of Powers Doctrine was prudential or constitutional has been eliminated. *See Id.* Since Separation of Powers is a

[12] *See, e.g.*, Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. Pa. L.Rev. 635 (1985) (Criticizing addition of Separation of Powers Doctrine to standing).

fundamental precept of the Constitution, it makes no sense to think that application of the standing test to ensure its preservation would be prudential. To the contrary, protection of the Constitution demands its application. Second, by focusing the analysis on the standing of a plaintiff, a court need not consider the merits of a case as thoroughly as would be necessary with issue-focused aspects of justiciability.

The case at bar presents an opportunity for this Honorable Court to analyze the elements of standing utilizing the Separation of Powers analysis set forth in *Allen v. Wright*. MSLF urges this Honorable Court to follow the line of cases represented by *Simon* and *Allen* and expand on the analysis as set forth below.

I. THE CAUSAL LINKS BETWEEN RESPONDENT AND THE ALLEGED WRONG-DOING AND THE RELIEF SOUGHT ARE TOO TENUOUS TO SUPPORT STANDING.

To meet the causation and redress elements of the test of standing this Honorable Court has looked at the relationship between a particular plaintiff and the issues of the case. While the Court does not look to the substance of a plaintiff's allegations, it must examine the causal links between the alleged wrongdoing and the plaintiff who seeks standing.[13] *Simon*, 426 U.S. at 41.

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[13] While in theory a court is not supposed to judge the merits of a claim, numerous commentators have complained that determinations of standing do involve judgment on the merits of a case. *See, e.g.*, Varat, *Variable Justiciability and the* Duke Power Case, 58 TEX. L.R. 273 (1980). A more comprehensive definition of the causation and redressability elements may alleviate this criticism.

Causation is a chain of events leading from the alleged wrong-doing to the injury. Past decisions on whether the chain is strong enough to support standing have often been intuitive. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.5 (2d ed., 1984). However, intuition or logic should consider, and be aided by, the underlying policy considerations. As in *Allen v. Wright*, the case at bar presents an appropriate situation for such policy analysis using the Separation of Powers Doctrine to interpret the causation element of standing.

Closely related to the causation element is that of redressability. The two "were initially articulated by this Court as 'two facets of a single causation requirement.' " *Allen v. Wright*, 468 U.S. at 753 n.19 (*quoting* C. WRIGHT, LAW OF FEDERAL COURTS § 13, p.68 n.43 (4th ed., 1983)). This close relationship is particularly evident in a case, such as this one, where the relief sought in the complaint is to set aside the alleged illegal action.[14] *See Id.* In fact, as shown by the analysis below, there is little substantive difference between the two. Like a chain of causation, redress of injury can require a chain of actions – a chain of redress. As a result of the close relationship between causation and redress, the following analysis will discuss the elements of causation and redress together.

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[14] It is important to distinguish the relief sought in the complaint – set aside of the Withdrawal Review Program for procedural errors – from the redress of Ms. Peterson's injury – presumably a prohibition of mining on 4,500 acres in Wyoming.

For purposes of this analysis of standing, Respondent's named member represents Respondent's interest. *Simon*, 426 U.S. at 40. Thus, in this case, the analysis must center upon Ms. Peggy Kay Peterson, the National Wildlife Federation member whose alleged injury served as the basis for the decision of the Court of Appeals to award standing to Respondent National Wildlife Federation. Pet. App. 18a.

Ms. Peterson, a person who might have an interest in 4,500 acres of land in Wyoming, sued to demand that the BLM's entire national Withdrawal Review Program be stricken and then reconstituted using different procedures.[15] The issue now before this Honorable Court is whether Ms. Peggy Kay Peterson is the proper plaintiff to bring this lawsuit.

On the one hand, we know very little about Ms. Peterson. Her affidavit indicates that she lives in Casper – some 140 miles from Lander – and uses some federal land for recreational purposes. The nature of the land or her recreational use is unknown.[16]

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[15] The lands in question were only "opened" to "mineral entry" under the General Mining Law of 1872, that is, American citizens who make a "discovery" of a "valuable" mineral may locate a mining claim on those lands. No mining activity which would cause a "significant" disturbance may take place without federal approval, including compliance with NEPA. See Jt. App. 62-64.

[16] An attempt by MSLF and the federal government to pursue discovery to ascertain these facts was blocked by a protective order. Pet. App. 170a.

On the other hand, the action she brings is to set aside and reconstitute the BLM's nation-wide Withdrawal Review Program, a congressionally mandated program that affects over 180,000,000 acres of federal land in 14 states. While she alleges harm from one termination of a land classification in Wyoming, she demands that 813 other agency actions across the country be set aside. The essence of her claim is that improper procedures were used to set up the program under which the 814 agency actions were taken.[17]

On the face of these facts, it is difficult to imagine what possible standing Ms. Peterson has to challenge the BLM's entire Withdrawal Review Program. On their face, these facts establish absolutely no link between the program and Ms. Peterson's alleged injury.

A. The Chain of Causation and the Chain of Redress Are Too Attenuated to Support Standing

An analysis of the chain of causation and the chain of redress in this case begins with a description of the facts that might make up the links of those chains. It should be noted that Respondent has failed to detail, either the chain of causation between the government action in setting up the Withdrawal Review Program and the injury Ms. Peterson claims, or the chain of government actions that would be

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[17] There is no evidence that Ms. Peterson participated in the public comment process that accompanied the BLM Management Framework Plan and the termination of the land classification that so concerned her. *See* Note 6 *supra*.

required to redress Ms. Peterson's alleged injury. The Court is left to speculate how the chains might be constructed.

Turning first to the chain of causation, Ms. Peterson's affidavit merely states that her "recreational use and aesthetic enjoyment of the federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected by the unlawful actions of the Bureau and Department." Pet. App. at 191a.

The reader of the affidavit is left to speculate which allegedly illegal actions are causing this injury. For that information one must look to Respondent's complaint. The illegal actions complained of are alleged procedural deficiencies in establishing the Withdrawal Review Program: specifically, failure to promulgate rules, failure to prepare a programmatic Environmental Impact Statement (EIS), and failure to prepare a specific type of land use plan.[18] Jt. App. at 18-22.

Using the information from the complaint, the chain of causation between the alleged illegal action and Ms. Peterson's alleged injury would be as follows: The procedural errors in setting up the program alleged by Respondent caused the BLM to fail to include in the

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[18] Initially, respondent alleged that the individual actions, *e.g.*, the classification termination in the South Pass-Green Mountain area of Wyoming, were not supported by the administrative record. Respondent dropped that count upon filing its Motion for Summary Judgment. *See* note 20 *infra*. Later the district court found the record in the Lander, Wyoming, classification termination completely adequate. *See* note 6 *supra*.

Withdrawal Review Program directives to state or local BLM offices that would address Respondent's concerns, *i.e.*, that mining not be allowed on the public lands. The absence of the planning directives resulted in the failure of the local BLM Management Framework Planning process to take into consideration Respondent's opposition to mining. The supposedly faulty planning process then caused the BLM to open the land to mineral entry.

However, consideration of the chain of causation must not end there. A prospector must discover sufficient mineralization to warrant staking a mining claim on the land. Next, the prospector must discover sufficient quantities of minerals to warrant submission of a mining plan of operations. Following that, the BLM must approve a plan of operations which complies with NEPA and contains environmental mitigation measures. *See* Jt. App. 62-64. Finally, mining must actually take place and the BLM in its application of the NEPA process must fail to mitigate the harm that is of concern to Ms. Peterson.[19]

The question posed in the analysis of this chain of causation is whether an alleged procedural error in setting up the national Withdrawal Review Program is the cause of a hole in the ground that offends the aesthetic sensibilities of Ms. Peterson. On the record presented by Respondent, the answer is undiscernable. Respondent has made no allegations to support any chain of causation

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[19] For example, mining need not harm wildlife habitat, let alone "the wildlife habitat potential" which is of concern to Ms. Peterson. Many mining plans include habitat enhancement as a mitigation measure to offset any disturbance.

linking the procedures establishing the Withdrawal Review Program to the aesthetic injury in Wyoming.

With regard to the other element of standing considered in this Argument, that is, the redress of grievances, Respondent again leaves the construction of that chain to the Court:

> Given my recreational use and enjoyment of the federal lands, my concern in ensuring that the laws pertaining to their preservation and protection are enforced, and my interest in participating in decisions affecting their future management, my interests are being adequately represented by NWF in its lawsuit against the Bureau and the Department and my interests will be fairly redressed by a decision favorable to NWF.

Pet. App. at 191a-192a. Ms. Peterson fails to mention how a favorable decision for NWF will redress the aesthetic injury she claims to have suffered. She does not mention how or whether mining on the 4,500 acres of land in question will be prevented by this suit.

If Ms. Peterson's aesthetic injury is to be prevented, then there must be a chain of redress linking a court's order for new procedures to reconstitute the Withdrawal Review Program to the continued closure of the 4,500 acres to mineral location. A hypothetical construction of the chain of redress is as follows: The new court-ordered-procedures must be likely to result in program directives that will cause state and local BLM offices to prohibit mining or keep lands closed to mining that would otherwise be opened. The program directives would be considered in the BLM's planning process. The BLM must then

act on those directives and prohibit mining on the particular land Ms. Peterson uses.

The BLM directives resulting from the court-ordered-procedures could apply to environmentally sensitive lands, or they could apply in a general fashion to all lands in the Withdrawal Review Program. Since Respondent provides no indication of the nature of the 4,500 acres of land – whether it has any special aesthetic attributes or other qualities – the directives would be of a type that generally discourage mining. Those directives would be likely to cause continued closure of the 4,500 acres and thus provide Ms. Peterson her redress.

B. Judicial Recognition of the Chain of Causation and the Chain of Redress in This Case Violates the Separation of Powers Doctrine

To apply the analysis suggested in *Allen*, this Honorable Court should examine each link of the chain of causation and the chain of redress to see its affect on the Separation of Powers Doctrine. 468 U.S. at 760-61. In examining each link two situations bear special consideration: first, where the direct cause of the injury is a discretionary action of the agency – other than an action challenged in the suit – and second, where redress would require a court to order an agency to exercise its discretion in a particular manner. In either instance, the Separation of Powers Doctrine will weigh against a finding of standing.

It is fundamental that standing requires direct causation. *Ex Parte Levitt*, 302 U.S. 633 (1937). However, if what is challenged as illegal in a lawsuit is not the discretionary action which is the direct cause of the injury, but another discretionary action which only indirectly bears

upon the first action, then causation is significantly diluted or the chain of causation is broken. For example, in challenges to allegedly unconstitutional statutes which were financed by subsequent – but unchallenged – taxes, this Honorable Court has denied standing based on taxpayer injury, in part because of the intervening discretionary congressional act of implementing taxes. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). *See also Flast v. Cohen*, 392 U.S. 83, 118-19 (1968) (Harlan, J. dissenting, explaining *Frothingham*). The tax which was the direct cause of the injury did not convey standing to challenge the original acts financed by the taxes. A similar situation exists where the injury-in-fact used to establish standing is based on a specific agency action and the legal challenge is not against that action, but rather against an agency program or policy. Like the taxpayer cases, the intervening discretionary actions break the chain of causation.

Moreover, the very nature of discretionary Executive Branch actions weighs against them as links in a chain of causation to establish standing. Each and every federal action embodies the consideration of a myriad of policies: on the environment, on economics, on national security, on immigration, on energy and mineral supply, on balance of payments, and on numerous other policies. A federal decision-maker utilizes his discretion to weigh each of these policies and then to make a judgement on how each should be applied in a given instance. If discretionary actions were subject to being set aside because of flaws in the creation of the policies or the programs that created the policies, then each individual action could be set aside for a myriad of reasons indirectly related to the action itself.

If a particular interest group chooses a given policy or program and litigates on that basis at every opportunity, then the decision-makers will have no choice but to give special recognition to that policy. If they do not, and the courts hear the complaint, then the administrative decision-making process will be constantly and regularly disrupted by judicial intervention. *See* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983) (regarding "over judicialization of the process of self governance"); J. Rabkin, Judicial Compulsions: How Public Law Distorts Public Policy (1989). The net result is that litigants can and have used the courts to elevate their own particular policy concerns at the expense of the policy concerns of the rest of the citizenry and at the expense of the duty of the Executive Branch to serve the interests of all the American people.

Turning to an analysis of the alleged personal injury in the case at bar, several of the links in the chain of causation between Ms. Peterson's alleged injury and the asserted illegalities in setting up the Withdrawal Review Program are discretionary actions of Executive Branch agencies for which no violation of the law is alleged. The last link that can be directly attributed to the agency – the opening of the 4,500 acres of land to mineral entry near Lander, Wyoming – is within the agency's discretion. Other than the alleged programmatic deficiencies, Respondent has not alleged that this action was illegal.[20]

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[20] Respondent dropped its challenge to the administrative record upon filing for summary judgement on June 5, 1986.

Moreover, Respondent has introduced no facts or law which indicate that the BLM decision to allow mineral entry on the 4,500 acres would be different under the reconstituted program which Respondent apparently seeks.

In the case at bar, Respondent has made no secret of the fact that it thinks the Administration favored a policy of promoting mineral development and did not give enough emphasis to the environmental concerns Respondent favored. However, if that is Respondent's concern then Respondent can still prevent, or at least affect, the mining activity to which it objects by participating, on a case-by-case basis, in the land use planning and administrative decisions leading to mining. Congress has directed the Executive Branch both to foster mineral development and to protect the environment. *See* Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1982); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-34 (1982). Those allegedly conflicting directives are not to be sorted out by litigants in the courts but are to be decided by the Executive Branch.

In an analysis of each link of the chain of redress, the question arises whether a court should order an agency to exercise its discretion in a particular manner. However, it is clear that such a court order to an agency would raise the issue of the Separation of Powers Doctrine and cast doubt upon the justiciability of the case.

Should a federal district court seek to redress the particular injury alleged by Ms. Peterson, it would have to order that the 4,500 acres in question remain closed to mineral entry, or alternatively, it would have to impose

procedures that would make it "likely" that the land would remain closed to mineral entry. *See Simon*, 426 U.S. at 43-44. Considering that this land is not alleged to have any special attributes, any ordering of such relief by a district court would constitute an intolerable intrusion into the management of the federal lands by the Executive Branch.

If the district court chose to limit its relief to ordering program directives that predetermined the outcome of the BLM's decision to open the 4,500 acres to mineral entry, it would be engaging in a similar intrusion. The illegal actions complained of go to the procedural steps of establishing the program, not to the substantive content of the Withdrawal Review Program directives. For a court to dictate the content of directives on how to review withdrawals and classifications of public land would be a clear intrusion into the Executive's function as manager of the federal lands and a violation of the Separation of Powers Doctrine.

Finally, if a district court chose to limit its relief to ordering new procedures in setting up the program, that order would have no discernable impact on Ms. Peterson's injury. There is simply no evidence, argument, or indication that the particular 4,500 acres Ms. Peterson claims to use would be treated differently if the program were reconstituted using different procedures. The redress element of the standing test fails. Thus, this case is not justiciable.

II. THIS HONORABLE COURT HAS HISTORICALLY TREATED ALLEGED INJURIES BASED ON PROGRAMS AND POLICIES AS TOO INDIRECT TO SUPPORT STANDING

From the beginning, this Honorable Court has given wide latitude to the prerogatives of the Executive Branch. In *Marbury v. Madison*, Chief Justice John Marshall noted:

> The province of this court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

5 U.S. (1 Cranch) 137, 170 (1803).

Later, when various plaintiffs have asked this Honorable Court to adjudicate programs, the Court has declined. For example, in *Ashwander v. TVA*, 297 U.S. 288 (1936), this Honorable Court addressed a challenge to an individual agency action and to the program under which the action was taken. While the challenge to the single agency action – a TVA contract – was allowed, the challenge to the program under which the contract was authorized was not. This Honorable Court found that the program being challenged "did not give rise to a justiciable controversy save as [it] had fruition in action of a definite and concrete character." *Id.* at 324.

This Honorable Court has more recently addressed challenges to agency programs in *Allen v. Wright*, 468 U.S. 737 (1984). In *Allen*, this Honorable Court used the "fairly traceable" element of standing in its reasoning. The Court discussed the issues as follows:

> The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury 'fairly can be traced to the challenged action' of the IRS. . . . That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication.

Id. at 759-60.

One reason for lack of standing is that a program never works a direct injury on a plaintiff. Only actions that work direct injuries are subjects for federal court adjudication. *See Ex Parte Levitt*, 302 U.S. 633 (1937).

Another reason for restricting adjudication of programs and policies is the potential scope of the litigation. The case at bar is ostensibly a dispute between Ms. Peterson and the BLM over the status of 4,500 acres of land in Wyoming, yet the relief requested affects at least 814 separate agency actions covering 180,000,000 acres in 14 states. Individuals, companies, and even environmental groups who had acquired interests in the public lands found their activities effectively blocked by the suit filed by Respondent and Ms. Peterson.

If all of those affected had tried to intervene to protect their interests the case would have become unmanageable. As it was, several with the most pressing conflicts did intervene or tried to intervene. For example, ASARCO, Inc., a mining company with claims in Oregon, sought to intervene. It had staked claims on land that had

once been classified for sale. While the "for sale" classification was supposed to expire automatically, the BLM had included its removal in the Withdrawal Review Program. For that reason ASARCO's mining claims were in doubt. There was never any "environmentally protective" restriction on the land. There was never any indication that Ms. Peterson or any other named member of the National Wildlife Federation would be offended or affected by ASARCO's proposed activities.[21]

Others who were impacted included the Trust for Public Land and the Nature Conservancy. Even the National Wildlife Federation petitioned the court for relief on one parcel of land. Pet. App. at 174a-175a.

Judge Williams of the District of Columbia Court of Appeals made the following statement in dissenting from that court's decision to uphold the preliminary injunction:

> The majority today upholds a district judge's self appointment as *de facto* Secretary of the Interior over 180 million acres – nearly one-fourth of all federal lands and more than one half of the public lands managed by the Bureau of Land Management ("BLM"). It does so without a showing that the BLM breached any legal requirement as to a single parcel of land. Even assuming such a breach, the record is barren of any hint that it was material or likely to harm plaintiff's interests – much less irreparably. Unable to sanction such a judicial usurpation of power, I dissent.

National Wildlife Federation v. Burford, 835 F.2d 305, 327 (1987).

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[21] Except, of course, NWF's generalized grievance against mining.

This Honorable Court should follow the *Ashwander-Allen* line of cases which holds that programs and policies of the Executive Branch are not justiciable.

III. THE PROGRAMMATIC AND POLICY INJURIES IN THIS CASE ARE NO MORE THAN A GENERALIZED GRIEVANCE

The very nature of the case at bar as a generalized grievance is underscored by the affidavit of Ms. Peggy Kay Peterson. Ms. Peterson does not ask for a halt to mining on the 4,500 acres she might use in Wyoming, rather she asks that her "concern in ensuring that the laws pertaining to their preservation and protection are enforced . . . " Pet. App. at 191a-192a.

The subject matter of this lawsuit is one quarter of all of the public lands of the United States, an area equal in size to the States of Texas, Vermont and New Hampshire combined. Hundreds of individual agency actions make up the challenged program. This suit is one that would never logically be brought by an individual acting in his or her own private interest. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). This is a suit that could only be brought by a national political advocacy group. Its purpose is to question the wisdom of the management of the public lands by the Executive Branch. As this Honorable Court stated in *Laird v. Tatum:*

> Carried to its logical end, [Respondent's] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediate

> threatened injury resulting from unlawful government action.

408 U.S. 1, 15 (1972) (quoted in *Allen v. Wright*, 468 U.S. at 760).

CONCLUSION

Respondent in this case seeks to set aside a nationwide program affecting over 180,000,000 acres of federal land. To establish its "standing" to bring this suit, Respondent claims a threatened injury on 4,500 acres in Wyoming. The connection between the threatened injury and the program is not direct. A discretionary Executive Branch action not challenged in this suit is the direct cause of Respondent's alleged injury. If a court were to adjudicate this case and grant relief it would be required to assume jurisdiction over that discretionary action and thousands of others like it. This would do great violence to the Separation of Powers Doctrine that is so fundamental to our Constitution.

For this reason and the other reasons set forth above, this Honorable Court should reverse the Court of Appeals and find that Respondent has no standing to sue.

Respectfully submitted,

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